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Supreme Court of the United States

OCTOBER TERM 1945

No. 608

JAMES A. TAYLOR,

Petitioner,

against

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the Court of Appeals of the State of New York unanimously affirming the judgment dismissing the complaint is reported in 294 N. Y. 397.

The Constitution of the State of New York provides that an appeal to the Court of Appeals may be taken as of right from a judgment or order entered upon a decision of the Appellate Division which finally determines an action or special proceeding wherein is directly involved the construction of the Constitution of the United States (Art. VI, Sec. 7(1); Civil Practice Act, Sec. 588). Petitioner took an appeal as of right, pursuant to these provisions, "on the ground that there 'is directly involved the construction of the Constitution of • • • the United States'" (his brief, p. 1).

The Court of Appeals dismissed that appeal (294 N. Y. 775).

Plaintiff reached the Court of Appeals, not under that asserted federal ground, but pursuant to the regular practice of securing leave so to do, as is provided for in Constitution Section 7, (5) and C. P. A. Section 589.

The Court of Appeals did not write in granting respondent's motion to dismiss the first appeal, or later in denying petitioner's motion for reargument (294 N. Y. 977).

The remittitur of the Court of Appeals (record, pp. 92-93) contains no certification that a federal question had been presented and necessarily passed upon.

The decision of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, unanimously affirming, without opinion the judgment of the Trial Court dismissing the complaint is reported in 269 App. Div. 662.

The opinion of the Trial Court is unreported. It is found in the record at page 39.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under Section 237b of the Judicial Code (USCA Title 28, Sec. 344b) asserting as grounds, rights, privileges and immunities under a Federal statute and under the United States Constitution (Petition, p. 2).

Statement of the Case

This is a third party action for personal injuries sustained on April 19, 1940, by a sleeping car porter employed by the Pullman Company, when the sleeping car attached to a train hauled by respondent, was derailed.

The New York State Workmen's Compensation Law in express terms covers work in parlor cars and sleeping cars.

Section 3, Group 14, 64 McKinney's Cons. Laws, page 175.

The original New York Workmen's Compensation Act required an employee entitled to compensation to elect whether to take compensation under the Act or to pursue his remedy against a third party.

Laws of 1914, Chap. 41, Sec. 29.

By subsequent amendments, this latter provision was amended, so as to provide that the employee is no longer bound to make that election, but may take compensation and also bring a third party action; and that, if he takes compensation and desires to bring a third party action, such action must be commenced not later than six months after the awarding of compensation (the first award; *Nelson* v. *Buffalo, Niagara Electric Co.*, 264 App. Div. 941, affirmed 292 N. Y. 600), and, in any event, before the expiration of one year from the date such action accrued.

Section 29, Subdiv. 1, 64 McKinney's Cons. Laws, page 403.

The State Compensation Act further provides that, if the employee has taken compensation under the Act, but has failed to commence his third party action within the above time limits "such failure shall operate as an assignment of the cause of action" against the third party to the corporation liable for the payment of such compensation (here the Pullman Company).

On May 13, 1940, the Pullman Company, the employer, duly filed the necessary form for compensation (Plaintiff's Exhibit 2, pp. 67-8).

On October 2, 1940, after a hearing before the New York State Industrial Commission, at which petitioner was present in person, he was awarded workmen's compensation for his injuries (Exhibit A, p. 69). The award was paid and accepted by him (record, p. 33).

On February 14, 1942, petitioner filed with the Department of Labor a notice wherein he made a "claim for all benefits due me under the Workmen's Compensation Act" (record, p. 71). Pursuant to that claim and after hearings, at which both he and his attorney were present (pp. 33-4) additional awards were made and accepted in June and December of 1942, June and November 1943 and in February of 1944. The awards in May, 1944, aggregated $3,234.39 (record, pp. 33-4) and petitioner still has a continuing right to compensation (Exhibit B, pp. 70-71).

It is undisputed that petitioner failed to commence his action against respondent within either of the periods specified in the Act (record, p. 10), that is to say, he commenced his action against respondent on January 30, 1942, which was 16 months after the award of compensation, and one year and nine months from the date such action accrued.

Therefore, as respondent claimed and the State Courts have held, the cause of action which petitioner had against respondent was assigned, by operation of the Act, to the Pullman Company, the corporation liable for the payment of his compensation (record, p. 69).

Petitioner did not disavow his claim under the Workmen's Compensation Law before the Appellate Division or the Court of Appeals. He insisted on it. In all courts, he still claimed that because of a certain contract between the Pullman Company, this respondent and other railways, he *continued* to have the right to bring this action under the Workmen's Compensation Law.

From his complaint, dated July 15, 1941 (record, p. 4), in which after describing respondent as a railroad, petitioner alleged that at all times hereinafter mentioned he was a porter employed by the Pullman Co. (record, pp. 5-6), to his motion for reargument in the Court of Appeals dated September 10, 1945, he insisted that, because of the said contract between the Pullman Company and respondent, he had a right, under the Workmen's Compensation Law, to bring this action when he did, and that his failure to bring the same within the periods specified in the Act, did not operate as an assignment to the Pullman Company or that he had a right to maintain the action as "*cestui que trust*" for the Pullman Company and himself (Petitioner's Briefs, App. Div. p. 24; Court of Appeals p. 29; Reargument p. 5).

These questions, quite obviously required the State Courts to construe the Workmen's Compensation Law and to decide whether the application thereof was affected by the said contract between the Pullman Company and respondent, which petitioner had pleaded in his amended reply and introduced in evidence and on which he had based this argument. It is quite obvious, and, we assume, undisputed, that this was a State question and not a federal question.

We respectfully urge, aside from other points, that the decision of the Court of Appeals that petitioner, by his own failure, had brought about an assignment to the Pullman Company of his cause of action, completely ended this litigation—that is to say, that this decision of a State and non-federal question that plaintiff, because of his own acts, has no cause of action and that the same belongs to someone else, is a finality.

FIRST

The remittitur of the Court of Appeals does not show that a Federal question was presented and passed upon. Petitioner has not made the customary motion to amend it.

The remittitur of the Court of Appeals (record, pp. 92-93) does not show that the decision of that Court on a federal question was necessary to the determination of the appeal, that a federal question was actually decided or that its judgment as rendered could not have been given without deciding it. The settled practice in New York is that an applicant for certiorari shall move to amend the remittitur so that the Court of Appeals may make an appropriate certificate and this Court may have the benefit of a statement by the State Court that federal questions were or were not necessarily passed upon by the State Court. The practice of the Court of Appeals is either (1) to deny the motion or (2) to certify that such a question was presented and necessarily passed upon and to further state what the Court actually held with respect to the question.

Matter of City of N. Y., 284 N. Y. 701;
People v. *Schneider*, 285 N. Y. 547;
People v. *Schappes*, 291 N. Y. 644;
Christie v. *46th Street Theatre Corp.*, 292 N. Y. 643;
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Mabee v. *White Plains Publishing Co., Inc.*, 294 N. Y. 701;
City of New Rochelle v. *Echo Bay Waterfront Corporation*, 294 N. Y. 771;
People v. *Lonergan*, 294 N. Y. 972;
People v. *Winters*, 294 N. Y. 979.

Petitioner made no application to amend the remittitur.

SECOND

Application does not appear to be within Section 344(b) of the Judicial Code or Rule 38(5) of the Rules for Review on writ of certiorari.

I. Section 344(b).

In this case, the decision of the Court of Appeals rested on a construction of the New York Workmen's Compensation Act. Petitioner fully argued that question in his briefs (*ante*, pp. 4-5). In the absence of an explicit statement by the Court of Appeals, in its remittitur, that its ruling upon an asserted federal question raised by petitioner was necessary to its decision of the case, petitioner is called upon to show from the record that it affirmatively appears that the decision did not rest upon an adequate non-federal ground.

McGoldrick v. *Gulf Oil Co.*, 309 U. S. 2.

That, we respectfully urge, he has not done and is quite unable to do.

II. Rule 38(5).

There are neither special nor important reasons for granting a writ in this case. The State Court has not decided a federal question of substance not heretofore determined by the Supreme Court. It wrote on the question which petitioner claims to be a federal one. It did so for the simple reason that petitioner had argued it. It decided this question in accord with applicable decisions of this Court. It cited and relied on decisions of this Court to show why petitioner was in error (record, p. 89). It did not distinguish or overrule any of them. It followed them.

As above stated, the New York Compensation Law provides for coverage for work in parlor cars and sleeping

cars and petitioner throughout claimed that he was entitled to compensation under the Workmen's Compensation Law as an employee of the Pullman Company. This appears from the pleadings and record.

The State Courts decided, with adequate basis for their decisions, that the pleadings and the evidence showed an action under the employment by the Pullman Company which was given by the Workmen's Compensation Act and that petitioner had failed to take advantage of the Act and that his cause of action had been assigned by operation of the Act to the corporation which had paid him compensation and that his asserted reasons, under the Workmen's Compensation Act, for bringing the action at the time he did were insufficient under the Workmen's Compensation Act. On a very similar record this Court has held that even writ of error does not lie.

> *Missouri, Kansas and Texas Railway* v. *West*, 232 U. S. 682.

THIRD

Petitioner's argument.

I. As to petitioner's position before the State Courts, we accept his statement in his brief for reargument in the Court of Appeals:

> "1. The Pullman Company, by reason of and under its contractual obligations to the defendant, at all times was unable and barred from prosecuting the cause of action; being thus incapable of serving as assignee, the provided for assignment, as a matter of substantive law, did not take effect.
>
> 2. Assuming title to the cause of action nevertheless vested in The Pullman Company, since the same section of the Workmen's Compensation Law

left the plaintiff the right to two-thirds of the recovery in excess of the compensation paid to him, as a matter of procedural law, he, as such owner of a substantial equitable interest in the cause of action, had the right to sue, upon demonstrating that the legal owner of the cause of action was dissipating, or would dissipate, his rights.

3. The plaintiff having been injured while working as an interstate railway employee, the New York State Workmen's Compensation Law does not apply to him."

Petitioner's arguments numbered "1" and "2"

It is unnecessary, in this brief, to enter into the interesting economic considerations which led the eminent draftsmen of the original Compensation Act and amendments to write the Act in its present form, or to review as fully as we did in the State Courts the various interlocking provisions of the Act, written to ensure compensation to injured employees and to obviate the necessity of their maintaining actions in the Courts.

Many years ago, in *Adams* v. *New Jersey Steamboat Company* (151 N. Y. 163, 168, 169), the Court of Appeals held:

"Sleeping car companies are neither innkeepers nor carriers.

"The contract for transportation • • • is with the railroad, the real carrier. All the relations of passenger and carrier are established by the contract implied in the purchase of the regular railroad ticket *and the sleeping car is but an adjunct to it,* only for such of the passengers as wish to pay an additional charge for the comfort and luxury of a special apartment in a special car (italics ours).

"The contract which gives the passenger the right to occupy a berth or a seat does not alone secure to him the right of transportation. It simply gives him the right to enjoy special accommodations at a specified place in the train."

We respectfully urge that Workmen's Compensation was a proper and urgently needed subject for State enactment (*post*, pp. 13-15) and was highly beneficial to Pullman porters (*post*, p. 14). We further urge that petitioner's complaint and activities in pressing arguments "1" and "2" in all the Courts, clearly show that the decision of the State Courts determined that the cause of action which he had failed to bring within the times specified in the Act, belonged to the Pullman Company, by operation of that Act, and that his other reasons have no materiality when once this contention under the Act has been found by the Court of Appeals, as a state and non-federal question, to be without merit.

Petitioner's argument numbered "3"

We respectfully urge that this argument is not of substance. As we have pointed out, the Court of Appeals dismissed an appeal by petitioner as of right based on the ground that there was directly involved the construction of the Constitution of the United States (*ante*, pp. 1-2).

Nor is the point novel. In *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 187, this Court was called upon to determine whether the Employers' Liability Act embraced an express company, which, like the Pullman Company, neither owned nor operated a railroad, and it held that the express company was not a "common carrier by railroad," as used in the Act before it, that those words mean one who operates a railroad as a means of carrying for the public—that is to say a Railroad Company acting as a common carrier and that this view was in accord with the ordinary acceptance of the words. In *Chicago Refrigerator Company* v. *I. C. C.* (265 U. S. 292, 297), this Court held, on the authority of the *Wells Fargo* case, that a Car Company, which like the Pullman Company owned cars (p. 294) was neither the owner of nor operated a railroad and was not a carrier by railroad. In *Robinson* v. *Balti-*

more & Ohio Railroad (237 U. S. 84), this Court passed on an earlier form of contract essentially like the one here construed by the Court of Appeals.

The Court of Appeals ruled on this question, citing the above decisions (record, p. 89) and did so in accord with such applicable decisions. It is petitioner who seeks to distinguish them, arguing that they are not in point because they did not involve employees rendering railroad service (petition, p. 10). But the Pullman Company is a sleeping car company. It is not a Railroad Company or a common carrier by railroad. It furnishes accomodations for greater travel comfort; it does not perform haulage functions. The work which Pullman porters perform in parlor and sleeping cars has nothing to do with the running of the train. Their duties are to attend to the inside of the car to which they respectively are assigned and to service passengers in such car.

These distinctions are so familiar and have been so clearly pointed out in *Wells Fargo & Co.* v. *Taylor, Chicago Refrigerator Co.* v. *I. C. C.* and *Adams* v. *New Jersey Steamboat Co.*, that we will not elaborate them here.

The inclusion of "sleeping car companies" in the definition of the term "common carrier" *"as used in this chapter"* in the Interstate Commerce Act, to which petitioner refers on page 17, is not in point. That Act similarly defines pipe line companies, telegraph companies, and express companies as common carriers. The term defined is simply "common carrier" and not "common carrier by railroad," as used in the Employers' Liability Act, which is an entirely different matter; but even if the latter term had been used, it would still not be in point, because it was needed for Interstate Commerce Commission to make directives as to rate making and the like.

> 49 U. S. Code Annotated, p. 48, notes to Sec. 1, par. 3, Definitions.

As we have already attempted to show, petitioner's contention under the State Compensation Act was decided on the pleadings, the contract and the record and resulted in a decision that petitioner's cause of action had been assigned to the Pullman Company, and that this is not the character of decision which this Court would be inclined to review even on writ of error (*ante*, p. 8).

As we have also attempted to show, petitioner, having invoked the Workmen's Compensation Law in the State Courts, seeking to obtain a decision, under State law, that his cause of action against respondent, despite his failure to bring the action within the statutory periods, subsists under the Workmen's Compensation Law, by reason of the contract between the Pullman Company and respondent, and the Courts, after considering the arguments of both parties, having decided, as a matter of State law, that petitioner's cause of action against respondent had become the property of the Pullman Company, there can be no basis for a claim that *he* can now maintain that cause of action against respondent at common law or under any other statute, or upon any theory (*ante*, p. 5).

Finally, petitioner can hardly be permitted to walk on both sides of the road, by having persisted in his claim under the State Compensation Act, and, simultaneously, having sought to be relieved of his own deliberate or negligent failure under that Act by claiming that the Workmen's Compensation Act does not apply. "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

Lynch v. *New York*, 293 U. S. 52, 54-5.

II. Petitioner, in his petition, sets forth four reasons for granting the writ (p. 9):

"1," in substance, is that this case presents a question of federal law not heretofore passed on by this Court. We urge that the cases which we cited and to which he refers in "1" dispose of this claim.

"2," in substance, is that there is a necessity of uniformity and, therefore, of exclusive national regulation and control of "railways and their labor relations."

This, we suggest, has nothing to do with the Pullman Company or the work of Pullman porters in serving passengers in "parlor cars" and "sleeping cars." The Pullman Company has nothing to do with the operation of trains.

"3," in substance, is that this case is of "great importance to petitioner" and to persons employed on Pullman cars, because, under the Federal Employers' Liability Act, he is entitled to "*full compensation*" (italics his) instead of the amounts allowed by the Workmen's Compensation Act.

But under the Federal Employers' Liability Act, an employee is not entitled to "compensation" at all!

He is merely given the right to maintain an action in the Courts for damages, under somewhat more favorable rules than at common law.

As to compensation for injured workmen. Some forty years ago, there arose in New York State a public demand for a compensation law for workmen, to ensure them compensation without their being compelled to have recourse only to the uncertainties, inequalities and expense of actions for damages, frequently coupled with contingent fees and what not. In addition, experience had shown that there was danger of injured employees and their dependents becoming objects of charity. Pursuant to this widespread demand, the State, in 1910, enacted a compensation law (Laws of 1910, Chap. 674), but it was held to be uncon-

stitutional (*Ives* v. *South Buffalo Railroad,* 201 N. Y. 271). The demand persisted and the Legislature twice approved a Constitutional amendment, as required for such an amendment, and the people approved it (Constitution, Article I, Sec. 18). Then came the new Act, adopted by Laws of 1914, Chapter 41. As we are credibly informed, every State in the Union, except Mississippi, has a compensation law. The New York Workmen's Compensation Act has long been recognized as a humane act and, during the intervening thirty years, it is a matter of common knowledge that it has worked well.

Petitioner's contention, in his reason "3," if it were sound, would deprive other porters of their right to compensation, and if they complied with the Act, as petitioner did not, to their right to bring a third party action under the Act. The loss of right to compensation in New York State would be tragic. "The Act does not purport to provide compensation *for a wrong*" (*Post* v. *Burger,* 216 N. Y. 544, 550). Deprived of his right to "compensation," an injured porter would be worse off rather than better.

As against the Pullman Co., since railroad accidents seldom involve negligence on its part (derailments from all causes, grade crossings and the like), the remedy by action would usually be valueless.

As against a Railroad, the remedy, in practical application, would differ only slightly from the third party action now provided by the Workmen's Compensation Law.

Thus, if there were any basis for petitioner's reasoning, a New York porter would merely exchange his third party action for the right of action provided by the Federal Employers' Liability Act, gaining nothing, *but losing the important benefits of compensation from his employer, even though his employer had done him no wrong.*

"4" Petitioner concludes his "reasons" (p. 10) by an appeal on behalf of a class—the persons employed on

Pullman cars. But this appeal of his, however well intended, does not include any such class. A Pullman porter who takes the benefits of compensation under the Act also avails himself of the Act, where he has a meritorious cause of action against a third party, by bringing a timely action under the Act. This appeal, therefore, relates to petitioner's individual case, where, although he availed himself of the Act by taking compensation, he deliberately or negligently failed to take advantage of the Act by bringing a third party action as provided in the Act. Such a case, quite obviously, is not of wide importance. It is an isolated case.

FOURTH

The petition should be denied.

New York, December 26, 1945.

Respectfully submitted,

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